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No. 234

In the Supreme Court of the United States
October Term, 1957

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DUVAL JEWELRY COMPANY OF MIAMI, INC., DUVAL JEWELRY COMPANY, JENKINS AND SONS, INC., JENKINS JEWELRY COMPANY, AND OLIVER A. JENKINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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OPINIONS BELOW

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QUESTIONS PRESENTED

Section 11 (1) of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. 151 et seq.) (herein called the Act) provides in part:

> "The Board, or its duly authorized agents or agencies shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings,

forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required."

The National Labor Relations Board (herein called the Board) has promulgated administrative regulations providing in part (Section 102.58 (c), Rules and Regulations, 29 U.S.C. Appendix 468):

> "Any person subpenaed, it he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena, petition in writing to revoke the subpena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however,* That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. * * * The regional director or the hearing officer, as the case may be, shall revoke the subpena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The regional director, or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. * * *"

This case involves a "representation" case heard before a "hearing officer" as distinguished from an "unfair labor

practice" case heard before a "trial examiner". Hearing officers have limited authority, the statute providing that hearing officers may not make recommendations with respect to the issues in a representation case. Under Board practice hearing officers make no decision or recommendations as to motions to dismiss petitions or the other "questions of representation" in issue and he is merely charged with the duty of preparing a record upon which the Board itself makes a decision.

The Board has provided in its Rules and Regulations (Section 102.57 (c)):

> "Unless expressly authorized by these rules and regulations in this part, rulings by the regional director and by the hearing officer shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board when it reviews the entire record."

This case was originally presented to the United States District Court for the Southern District of Florida on petitions by the Board for enforcement of one ad testificandum and several duces tecum subpoenas issued by the Board. The District Court entered an order. (R. 152-155) quashing the subpoenas on the grounds they were "unreasonable, burdensome and oppressive" and were not issued according to law in that they were not issued upon application of a "party" to the proceedings before the Board.

The Board appealed to the United States Court of Appeals for the Fifth Circuit which rendered an opinion (R. 160-166) holding that the Act contained no provision for a petition to revoke an ad testificandum subpoena; that the Act did not empower the Board to delegate to hearing officers in representation cases the power to rule upon pe-

titions to revoke subpoenas; that only the Board could rule upon such petitions to revoke; that the Board's jurisdiction in this respect is original and not appellate and that Respondents were not required to request "special permission of the Board" to appeal; and that the applications for the subpoenas were properly made by a "party" to the proceeding. The District Court was held in error in declining to enforce the subpoena ad testificandum and in not declining to rule upon the duces tecum subpoenas.

The questions presented therefore are:

1. Does a hearing officer in a Board representation case have power or jurisdiction to rule upon petitions to revoke subpoenas?

2. Were petitions by Board in District Court for judicial enforcement of its subpoenas duces tecum premature where Board had failed to rule upon such petitions to revoke?

STATEMENT

A. The Board Representation Proceeding

In November 1955, Local 1625, Retail Clerks International Association, AFL-CIO, filed a petition pursuant to Section 9 (c) of the Act with the Board's Regional Office. The petition sought a representation electing among the employees of a retail jewelry store in Miami, Florida (R. 13-18). At the hearing held on the petition, the employer filed a motion to dismiss the proceeding on the ground that his interstate operations did not meet the Board's administrative standards for the assertion of jurisdiction. He refused, however, to testify or furnish information on this

issue, because of the unreasonable and oppressive nature of the subpoenas, whereupon the hearing was adjourned for the purpose of permitting subpoenas to be issued to secure the relevant data and testimony. Five subpoenas *duces tecum* and one subpoena *ad testificandum* were then issued. In accordance with the Board's regulations and practice, they were issued by the Regional Director upon application of the Board attorney assigned to the case, and contained the facsimile signature of a Board member, here Member Murdock (R. 29-35, 36-38, 62-66, 85-89, 109-113, 136-138, 139-140).

The Respondent corporations, together with the several other corporations named in the subpoenas, operate a retail jewelry business in the State of Florida. Each retail store is operated by a separate Florida corporation. The only store involved in the Board representation case is the Miami, Florida store and the only employees involved were the employees of that store. Oliver A. Jenkins, the president of the several Respondent corporations, was named in the *ad testificandum* subpoena (R 6-12, 48-53).

B. The Subpoenas

The subpoenas *duces teeum* were served upon the Respondent corporations on January 3, 1956 and the Respondent Oliver A. Jenkins was served the *ad testificandum* subpoena on January 6, 1956. (January 3, 1956 was a Tuesday; January 6, 1956 was a Friday). The subpoenas required the production of books and records of the several corporations, or in the alternative, a statement, showing generally *all* purchases made by all of said corporations *for an entire year; all purchases* made *for or on behalf of* some *sixteen* or *eighteen other corporations*, the identity of *each supplier* and the amount of *each individual purchase*

from *each supplier, all sales* made by *each* of said corporations to some sixteen or eighteen *other corporations* and the dollar value of *each sale*—all for an *entire year of operation* of *each* of the several corporations served with subpoenas. It is to be noted that the subpoenas required the furnishing of records or statements showing *separately* records of purchases made by *each corporation subpoenaed* for or on behalf of some *sixteen* or *eighteen* other corporations and the individual amounts of *each* sale to *each* corporation, all for an *entire year* of operation. It is further to be noted that the subpoenas required the furnishing of records or statements showing in addition to the records of the purchases, *each and every sale* made by Duval Jewelry Company, Jenkins Jewelry Co. and Jenkins and Sons, Inc., to *each* of *sixteen* or *eighteen other corporations* operating sixteen retail jewelry stores throughout the State of Florida—all for an *entire year of operation.*

The principal offices of all Respondents are located in Jacksonville, Florida, where most of the records of all are kept.

It is further to be noted that the subpoenas required the production of said records, or said statements, on January 10, 1956, at Miami, Florida, a city approximately 350 miles away from the principal offices of said corporations. Thus the subpoenas to the corporations allowed Respondent corporations less than six working days within which to comply and Oliver A. Jenkins was allowed less than three working days within which to comply. (R. 51-52; 62-66; 74-76; 86-88; 97-99; 109-113; 114-115; 122-124; 136-138; 142; 148-150).

The subpoenas *duces tecum*, by their terms, allowed the Respondents the privilege of submitting a "written state-

ment giving the information sought to be subpoenaed" (R. 9) in lieu of producing the records. However, the Respondents alleged in their several answers in the District Court (see citations in preceding paragraph) that the preparation and production of the statements allowed by the subpoenas would have required approximately eight weeks' time because of the all-embracing and detailed nature of the demands made. These statements in the answers were never denied nor questioned by the Board at any stage of the proceedings.

The primary purpose of the subpoenas, as stated in the Board's petition in the District Court (R. 11), was to enable the Board to determine whether or not it would assert jurisdiction over Respondents. The jurisdictional standards of the Board regarding retail stores depend upon the annual dollar volume of purchases and sales, both directly and indirectly from suppliers out of the State and upon dollar volume of shipments eventually going out of the State. It therefore became necessary under the subpoenas to determine from the records of sales and purchases of each corporation, for an entire year, the dollar amounts of *each sale* and the dollar value of *all purchases* made by the corporations and to separate the *direct* from the *indirect* purchases, since different standards are applied by the Board to direct and indirect purchases. Briefly, direct purchases are those made and received from out-of-State suppliers. Indirect purchases are those made of goods which originated outside the state but are purchased within the state.

It is obvious that it became necessary for the Respondents, in order to intelligently present their position on jurisdiction to the Board, to ascertain these figures and data for their own information and guidance. Without such data Respondents would have been prejudiced in the presentation

of their defenses to the petitions and the several respondent corporations would have been unable to present an accurate and complete picture of their operations to the Board.

The Board originally named the single Miami store as the employer in the representation case. However, after the Miami corporation answered filing a motion to dismiss, supported by affidavit, that the Miami corporation was not subject to the Board's jurisdiction under its standards then in effect, the Board amended the representation petition and added several other corporations not in Miami and whose employees were not in any way involved (Case 10-RC-3333; R. 8; 57; 80; 103; 129).

The Respondents timely filed their several petitions to revoke with the National Labor Relations Board in Washington, sending a courtesy copy to the hearing officer (R. 41, 69, 92, 117, 143). These petitions to revoke were filed directly with the Board and addressed to the Board. The Board bundled up the petitions to revoke and returned them to counsel for Respondents, refusing even to file them. As shown on the petitions to revoke they were mailed to the Board on January 7, 1956. The Board retained them until January 11, 1956 when they were mailed back. (See Exhibit A). The hearing officer in the representation case thereupon undertook to rule upon the petitions to revoke, denying each petition, and asserting as the ground for denial that "said petitions raise no substantial issue as to the validity of said subpoenas" (R. 45-46).

The Respondents did not comply with the subpoenas and the Board commenced suits for enforcement in the District Court, which denied enforcement upon the grounds

that the subpoenas were upon their face "unreasonable, burdensome and oppressive" and were not issued upon the application of a "party" to the proceedings as required by the Act (R. 152-155).

The Board appealed the District Court's order to the United States Court of Appeals for the Fifth Circuit specifying as errors: (1) That the District Court erred in holding the subpoenas to be "unreasonable, burdensome and oppressive" and (2) That the District Court erred in holding that the subpoenas were not issued to a "party" to the proceedings, and (3) That the District Court erred in quashing the subpoenas and refusing enforcement.

The Court of Appeals did not rule upon the oppressive nature of the subpoenas and did not mention this as to the *duces tecum* subpoenas and only incidentally mentioned this issue as to the *ad testificandum* subpoena (R. 164 and note 8, page 164), stating in a note to the text of the opinion that "In any event, courts can usually remove the oppression or burden without quashing the entire subpoena". It is to be remembered, however, that the trial court made no effort to remove the oppressive nature nor did the Court of Appeals. The reason is of course obvious—both courts had found that the subpoenas could not have been enforced upon other grounds regardless of their oppressive nature.

We have gone into some detail in this statement of the case because we do not agree with the Board's statement of the proper issues in this court and we believe the record and this statement properly justifies Respondents' statement of issues.

SUMMARY OF ARGUMENT

Hearing Officers of the Board in representation cases have no power, authority or jurisdiction to rule upon petitions to revoke Board subpoenas.

At the outset it is well to recognize that we are here concerned with a *representation* Board case and a *hearing officer*, not with *an unfair labor practice* case and a *trial examiner*. Originally the Board considered the two approximately equal in authority and duties in all respects and especially in reference to subpoena matters. The Series 1 Rules and Regulations (Series 1, effective April 27, 1936, 1 LRRM 811-820) applied equally to hearing officers and trial examiners.

The hearing officers originally were also called trial examiners and all trial examiners hearing both representation and unfair labor practice cases were under the Board or the Chief Trial Examiner (Section 5, Rules and Regulations, Series 1). In all respects the investigative and prosecutive authorities and duties under the Act were thus all under the control of the Board without separation.

The Administrative Procedure Act (Title 5, § 1001 et seq. U.S.C.A.) effective June 11, 1946, made a distinction between hearing officers in representation cases and trial examiners in unfair labor practice cases. Section 1004 of that Act specifically excepted "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved" (among others) "the certification of employee representatives". Therefore, as to the greater part of the Administrative Procedure Act, the hearings and

hearing officers in representation cases are not covered, but the entire act does apply to trial examiners and unfair labor practice hearings.

As to this issue we are concerned with interpretation of Section 11 (1) of the Act and the intent of Congress in its enactment. There is no question but that under the literal wording of the Act only the Board can rule upon petitions to revoke subpoenas. The intent of Congress in its enactment is shown by reason of the fact that Section 11 (1) changed entirely the handling of subpoenas, not only as to issuance but as to revocation. Congress obviously was aware of Board practice and just as obviously changed it. The substance of the changes as to subpoenas was that issuance was made mandatory and merely a ministerial duty and for the first time, a procedure was set up for revocation.

Board practice under the original National Labor Relations Act (49 Stat. 449) authorized the Board to issue subpoenas but neither that law nor Board Rules provided for revocation. Thus trial examiners or regional directors decided upon the validity of subpoenas at the time of application or issuance. This practice was changed by the passage in 1947 of the Amendments to the National Labor Relations Act so that the issuance of subpoenas was made merely a ministerial, automatic, mandatory Act by hearing officers, trial examiners or regional directors upon a proper application for such subpoenas. But the amendments of 1947 changed other practices of the Board by setting up revocation machinery; indicating disapproval by Congress of the previous procedures of the Board as to the entire method of handling subpoenas.

The Brief and argument of the Petitioner here seemingly have an irreconcilable conflict: The argument is (Petition-

er's Brief 8-10) that the Bord has not delegated authority to hearing officers to rule upon subpoenas and that if they have delegated such power it is authorized by the Act. Respondents take the position that there has not been and cannot legally be a delegation of authority to hearing officers to rule upon revocation of subpoenas. This is shown by the legislative history of the Act and by the clear and unambiguous wording of the Act itself.

The Board's application to the District Court for enforcement of the subpoenas *duces tecum* was premature because the board had not ruled upon said petitions as required by law.

The Act provides in Section 11 (1):

> "Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition *the Board* to revoke, and *the Board* shall revoke such subpena if in *its* opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in *its* opinion such subpena does not describe with sufficient particularity the evidence whose production is required". (Emphasis supplied).

The section above quoted very clearly, and in unambiguous words, places the authority to rule upon revocation only in the Board itself. Aside from the legislative history of the Act, which will be adverted to later, there is other wording indicating the intent of Congress. First, it is obvious that if Congress had intended that this authority be delegated it could very simply have made it so. As an example of this in the next ensuing words after the above quoted part of Section 11 (1) occurs this language:

"Any member of the Board, *or any agent or agency designated* by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. * * *" (Emphasis supplied).

The last quoted language itself refers to hearing officers and trial examiners and allows the Board to delegate to them, as the Board's representatives, the power to administer oaths, examine witnesses and the like. But this grant of power is pointedly left out of the immediate preceding wording. It also should be noted that the latter wording merely *confirmed* the existing practice of the Board and the wording about revocation of subpoenas *changed* Board practice.

Since hearing officers have no authority nor jurisdiction to rule upon recovation of subpoenas it follows that the application to the District Court was premature, as found by the Court of Appeals.

It is a novel proposition the Petitioner makes. The Respondent refused to comply with subpoenas; petitions to revoke were filed directly with the Board and returned by the Board without a ruling on them; the hearing officer whom the Board says has authority delegable to him from the Board to rule, attempted to rule upon the petitions and notified the Board of his ruling; the Board itself then, after refusing to rule, goes into District Court seeking enforcement of the subpoenas and now tries to say that because it has not ruled the Respondent cannot defend the suit. This position is not justified by the Act which does not provide for an appeal to the Board from a hearing officer's ruling; the Petitioner attempts to justify it upon the ground of a Rule adopted by the Board which, in negative language only, says that a party cannot appeal a hearing officer's

ruling directly to the Board except by express permission of the Board. This is neither an appeal as a matter of right nor a *requirement* of the rule. The doctrine of exhaustion of administrative remedies does not apply to the Respondents who were not the moving parties in the enforcement proceeding and certainly would not apply to bar the Respondents from asserting their valid and bona fide defenses to the enforcement proceeding especially where the Board had several opportunities to rule upon the petitions, was asked to do so and refused.

ARGUMENT

A. Hearing Officers of the Board in Representation Cases Have No Power, Authority or Jurisdiction to Rule Upon Petitions to Revoke Board Subpoenas.

Hearing officers are employees of the Board having very little power or authority. Under the Act they are expressly prohibited from making "any recommendations" in respect to the representation issues in the cases before them even though the hearings are *investigations* rather than prosecutions. Their function is to get up the facts and send them to the Board, a purely administrative duty. Hearing officers cannot rule upon motions to dismiss, or upon any of the issues regarding the bargaining unit, or supervisory employees or their status or even make any recommendations thereupon. They cannot rule upon the credibility of witnesses even though they are the only Board employee who hears the witnesses testify and can observe their demeanor. They cannot rule upon conflicts in testimony. They cannot even make recommendations to the Board on these matters. But their powers were not always thus. Board pro-

cedure under the National Labor Relations Act as originally enacted, and the Rules of the Board prior to the 1947 Amendments to the law, hearing officers in both investigative hearings and in prosecutive hearings in unfair labor practice cases were considered on a par. At that time the hearing officers ruled upon the validity of subpoenas at the time a request for a subpoena was made. If the hearing officer felt a subpoena should not be issued, he decided that it shouldn't be. Hearing officers and trial examiners had power under the Board's Rules (Series 1 effective April 27, 1936) to rule upon motions to dismiss, and in fact Section 15, Article II, provided that he "shall rule upon all motions" (with some exceptions not pertinent here). The hearing officers could make reports and recommendations.

The Congress in 1947 changed the law and the practice of the Board radically. Congress attempted to separate the purely administrative and investigative functions of the Board in representation cases from the function of prosecution in unfair labor practice cases. Hearing officers in representation cases were reduced merely to administrative employees with no judicial authority and to a state of little more than reporters. By Act of Congress they no longer were permitted to make a judicial decision upon the propriety or legality of subpoenas. And Congress went further than that—it provided in clear and unmistakable language that only the Board could rule upon revocation petitions. Congress was of course aware of Board practice at the time of Amendments of the National Labor Relations Act. Since there was nothing in the original Act about revocation and nothing in the Board's Rules about revocation and the practice of the Board's hearing officers was to rule upon revocation, it seems inescapable that Congress intended to change not only the exercise of this authority by the hear-

ing officers but also to set out an entirely new and clear-cut method for handling the judicial act of ruling upon revocation of subpoenas.

Under the Act only the Board can apply to the courts for enforcement of a subpoena. Here the language in the Act is the same as in the reference to revocation—" * * * upon application *by the Board* (the court) shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered * * * ." (Emphasis supplied). There has been no question by the Petitioner nor anyone else so far as we know that the wording of this section means anyone other than the Board itself, and the Board itself brought the application to the District Court.

Notwithstanding the plain mandate of Congress that hearing officers and even the Board itself must issue subpoenas when requested, the practice of the Board actually subverts the intent of the law and Congress. In practice if the hearing officer is requested to issue a subpoena, he does so, but if he thinks it improper he will advise the party subpoenaed if he is present or the other party to the proceeding that he will entertain and grant a motion to revoke. Thus the Board's practice in effect has been continued just as it was before the Amendment as to issuance of subpoenas and if the Board prevails in this feature of this cause the Board's practice will, in effect, be the same as it was before the attempt of Congress to change it—the hearing officer can prejudge the validity of a subpoena by announcing he will issue it and immediately revoke it. For an example of Board practice in this respect we submit one of the cases cited by the Petitioner in its brief *Burnup & Sims Inc.*, 95

NLRB 1130, Case No. 10-RC-1209. In this case, which the Petitioner cited as giving an example of the Board reviewing a decision of a hearing officer on a petition to revoke (Pet. Brief 20, Note 9), the hearing officer stated (Tr. 23): " * * * the Act requires me to issue that subpoena, which I will do if requested. I was merely stating to him (counsel) that in the event of a petition to revoke by the union, that I would grant that motion to revoke * * * ." Later when counsel wanted to make it clear that the union would make a motion to revoke the union representative asked the hearing officer "Let me see if I understand just what you want me to do" (Tr. 26). The practice of the Board's hearing officers where a subpoena is prejudged by him to not be proper, is to announce and even suggest to the other party, or the party subpoenaed, that even though he is required to issue the subpoena he will immediately revoke it.

The Administrative Procedure Act also undoubtedly had some effect upon Congressional action in amending the National Labor Relations Act in respect to the powers and authority of hearing officers in investigative proceedings. That Act recognized the minor position held by hearing officers in representation cases and specifically excluded representation cases from most of its purview, although all of the applicable parts of that Act apply to trial examiners in unfair labor practice cases.

This case is not concerned with the issuance of subpoenas but with their revocation. A subpoena must be issued if properly applied for. The *issuance* of a subpoena therefore requires no discretion or judicial consideration. It does not involve adverse rights. However, the *revocation* of a subpoena is an entirely different matter. The agency ruling upon revocation is called upon for interpretations of

law and court decisions. Legal rights and liabilities, even Constitutional rights, are asserted and defended and ruled upon in such cases. The provisions in the Act relating to revocation of subpoenas are, in part, for the protection of parties and others from oppressive or unreasonable use of the subpoena powers. We believe Congress intended only the Board to have this important power and authority. If the Petitioner's theories are correct and its present practices are allowed to continue, parties to Board proceedings will remain subject to the whims of minor employees of the Board in respect to one of the most important judicial powers—the power of subpoena.

Remembering that subpoenas in a representation case are not returnable before a judicial officer, but to a hearing officer of strictly limited and nonjudicial powers, makes this court's observations in *Cudahy Packing Company of Louisiana v. Holland* (1942) 315 U. S. 357, 62 S. Ct. 651, 86 L. Ed. 895, 5 Labor Cases ¶ 51, 128, appropriate:

> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer."

Aside from the general considerations noted above, and the plain and unambiguous wording of the Act itself upon the question of the authority of a hearing officer to rule upon petitions to revoke subpoenas, we have compelling factors in the legislative history of the Act. The Court in the case of *N.L.R.B. v. Pesante*, U.S.D.C. So. D. Calif., 119 F. Supp. 444, 25 Labor Cases ¶ 68,209, 33 LRRM 2569 (1954), held that only the Board, or an authorized panel of members of the board, had authority to rule upon petitions to revoke

subpoenas, and that such power could not be delegated, by rule or otherwise, to hearing officers, or any one else and in so holding, discussed thoroughly the legislative history of the Act. The Court said:

"The Act as originally passed by the House of Representatives contained a provision in Section 11 which permitted the Board or *its duly authorized agent or agents* to revoke, *'if in its, his, or their'* opinion evidence did not relate to any matter under investigation or *'if in its, his, or their opinion'* the subpoena did not describe with sufficient particularity the evidence whose production was required. The Act as originally passed by the Senate had no provision in it relating to the revocation of subpoenas. *But the Act as finally adopted by both houses, dropped the language which permitted any duly authorized agent or agents of the Board to revoke subpoenas or to hear petitions to revoke,* as contained in the original House Bill, and gave that authority only to the Board.

"The specific language contained in the original House Bill is as follows: 'Within 5 days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board or *its duly authorized agent or agents* to revoke, and the Board, or *such agent or agents,* shall revoke such subpoena if in its, *his,* or *their* opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation or any matter in question in such proceeding, or if in its, *his* or *their* opinion, as the case may be,' the subpoena did not describe with sufficient particularity the documents desired." (Emphasis in original text).

The Court further stated:

" * * * Obviously from reading the text of the Act, and without any recourse to the legislative history, the con-

clusion is inescapable that Congress intended a different power to be granted to the Board in connection with the issuance of subpoenas than it did in its grant to the Board of the investigatory powers and the administration of oaths; and, just as obviously, it intended to grant a different power to the Board in connection with revocation of subpoenas than either the issuance thereof or the investigatory and oath giving powers.

"From the face of the Act and from the legislative history it would seem to me that the powers granted in Section 11 concerning the issuance of subpoenas was not delegable and might be exercised by the Board *or any member* thereof, but that the *revocation* of subpoenas could *only* be exercised by the Board acting as a *whole Board* or through one of its panels authorized to be set up in panels of three, as set forth in Section 3 (b) of the Act (29 U.S.C.A. ¶ 153 (c))." (Emphasis in original text).

The Court in the *Pesante* case quoted extensively from the United States Supreme Court decision in the *Cudahy* case (supra) particularly noting that the Supreme Court emphasized the fact that specific authority to delegate subpoena power was given in both Senate and house bills as the Fair Labor Standards Act was originally passed but that that authority was eliminated when the act was finally passed by Congress, and that exactly that same situation occurred when the Act in question was passed, and as to the exactly same matter: subpoena power.

The Court in the *Pesante* case also quoted from the case of *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 US 111 (1947), in reference to the question of whether or not the Board could by rule or regulation delegate power to perform a particular function, as follows:

"The Mohawk case further distinguishes the Cudahy case in saying that the Act involved in the Cudahy case granted no broad rule-making power, whereas the Emergency Price Control Act did grant such rule-making power in the following language: 'The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act,' which is almost the same language as that contained in the Taft-Hartley Act. As to that the Supreme Court further said in the Mohawk case, (page 121): 'Such a rule-making power may itself be an adequate source of authority to delegate a particular function, *unless by express provision of the Act or by implication it has been withheld.* See Plapao Laboratories v. Farley 67 App. D.C. 304, 92 F. 2d 228)' (Italics Supplied). The express provisions of Section 11 of the Taft-Hartley Act granting power to the *Board or any member* thereof to issue subpoenas, and to the *Board* only to hear and act on petitions for revocations, when considered in light of the legislative history, specifically eliminating the power of any agent or agency of the board to hear petitions to revoke, brings Section 11 within the exception noted above in the Mohawk case, and clearly within the holding in the Cudahy case, that where an express delegation contained in an act before its final passage, is dropped out in conference, and thus passed by Congress, there is a clear implication that Congress did not intend such delegation" (Emphasis as in original text).

The *Pesante* case is well reasoned. The decision is exactly in point and held to be unlawful the very practices and procedures now insisted upon by the Board. The *Pesante* case was decided against the Board in these particulars, was not appealed, has not been reversed or overruled and was followed by the court below in respect to delegation of power to hearing officers in representation cases. The *Pesante* case and the judgment appealed from, are the only decisions of any court which rule upon the

issue of whether or not a *Hearing Officer* in a *representation proceeding* before the Board has authority to rule upon revocations of subpoenas, so far as we know. However, the decision of this Court in *Cudahy Packing Company of Louisiana v. Holland,* supra, covers completely the question of *delegation* of the subpoena powers by an administrative officer. In that case the Wage and Hour Administrator made somewhat the same contentions Petitioner is making here, i.e., that the power to delegate the subpoena power is to be inferred from the nature of his duties and from the fact that under the Act in question in that case he may, through designated representatives, gather data and make investigations authorized by that Act, and he pointed to the wide range of duties imposed upon him, the vast extent of his territorial jurisdiction, and the large number of investigations required for the enforcement of that Act. From these factors he argued that Congress must have intended that he should be permitted to delegate his authority in reference to subpoenas. The Supreme Court held that the Wage and Hour Administrator was not authorized to delegate his subpoena powers—although he could exercise them himself.

This Court said:

> "The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a congressional purpose not to authorize by implication a delegation of the subpoena power."

In that case, as in the instant case, the law in question did not specifically authorize the administrator to delegate the subpoena power to others. The Court also noted that the legislative history of the Wage & Hour Act showed that specific authority to delegate subpoena powers, which

had been inserted in preliminary drafts of the Wage & Hour Act, was eliminated from the final wording of the Act by the Conference Committee. This was also the case with the Labor Management Relations Act, in *exactly* the same manner and *exactly the same subject*. (See *Pesante*, supra).

This Court stated further:

> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. Under the present Act, the subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time. * * * All these are cogent reasons for inferring an intention of Congress not to give the responsible head of an agency unrestricted authority to delegate the subpoena power which it has in terms granted only to him.
>
> "The subpoena power differs materially in these respects from the power to gather data and make investigations which is expressly made delegable by Paragraph 11. Without the subpoena that power is in effect a power of inspection at the employer's place of business to be exercised only on his consent. It is much less burdensome than the requirement of his selection of great numbers of books and papers and their production at other places. Because of these differences it seems to us fairly inferable that the grant of authority to delegate the power of inspection and the omission of authority to delegate the subpoena power shows a legislative intention to withhold the latter. Moreover, if a subpoena power in the regional directors were to be implied from their delegated authority to investigate, we should have

to say that Congress had no occasion expressly to grant the subpoena power to the Administrator, who also has the power to investigate, and that the grant to him was superfluous and without meaning or purpose.

"The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena powers. The Interstate Commerce Act, the National Labor Relations Act, and the Federal Trade Commission Act, whose subpoena provisions were adopted by the present Act and by the Packers and Stockyards Act, all fail to grant authority to delegate the issuance of subpoenas. It appears that none of the agencies administering these acts, has construed the authority of its head to include the power to delegate the signing and issuance of subpoenas. On the other hand, Congress, in numerous cases, has specifically authorized delegation of the subpoena power. In others it has granted the power to particularly designated subordinate officers or agents, thus negativing any implied power in the head to delegate generally to subordinates. The suggestion that the Administrator is given authority to delegate the subpoena power because the applicable Trade Commission Act authorized individual members of the Commission as well as the Commission itself to sign subpoenas overlooks the fact that the Administrator alone occupies a position under this Act corresponding to that of the Commissioners under their Act. The structure of the Trade Commission Act lends no support to the view that the Administrator has an implied power to delegate the signing and issuance of subpoenas to persons undesignated by the statute, a power not granted to or exercised by the Commission or its members.

"All this is persuasive of a Congressional purpose that the subpoena power shall be delegable only when an authority to delegate is expressly granted. That purpose

has been emphasized here not only by the authority expressly given to delegate the power to conduct investigations, and in the adoption by reference of the subpoena provisions of the Federal Trade Commission Act, which contain no authority to delegate, but by the legislative history of the present Act, which shows that the authority to delegate the subpoena power was eliminated by the Conference Committee from the bills which each House had adopted. Such authority expressly granted in the bill which passed the Senate, was rejected by the Conference Committee. It also discarded the provisions of the House bill which committed the administration of the Act to the Secretary of Labor, who has a general power of delegation under Rev. Stat. Sec. 161, 5 U.S.C. Sec. 22, and placed in his stead the Administrator, who was given only the subpoena powers of the Federal Trade Commission incorporated in the House bill.

"We cannot assume that Congress was of the opinion that the present agency, when appropriately organized for the purpose, would be any the less able to function without the power in the Administrator to delegate the signing and issuance of subpoenas than the Federal Trade Commission, the Interstate Commerce Commission, and other agencies which have not been given and do not assert the power. Nor can we assume, as the Government argues, that Congress is wholly without design in withholding the power in this case and granting it in others, or even if it had been, that it is any part of the judicial function to restore to the Act what Congress has taken out of it. Even though Congress has underestimated the burden which it has placed upon the Administrator, which is by no means clear, we think that the legislative record establishes that Congress has withheld from him authority to delegate the exercise of the subpoena power, and that this precludes our restoring it by construction."

The facts of the *Cudahy* case, the law involved, and the issues, are almost indentical with the instant facts, law and

issues. There is great similarity even in the legislative history of the two laws involved and the practice of the two administrative agencies involved.

Upon the matter argued at this point, to wit, that the Board could not delegate its subpoena powers, the Respondents again cite the case of *National Labor Relations Board v. Pesante*, supra. This was a decision against the National Labor Relations Board, involving almost exactly the same issues as are involved in the instant case, which decision was not appealed and which has not been overruled or reversed. In the *Pesante* case the court held that the power granted by Section 11 of the Act concerning the revocation of subpoenas could only be exercised by the Board, or a member thereof, and was not delegable. The Court said:

> "The first sentence of Section 11 (1) relates to investigations. It specifically gives authority to the Board or its duly authorized agents or agencies to do the things therein set forth. The second sentence contains no such broad delegation but is more limited and simply provides *the Board or any member thereof* shall issue subpoenas. The third sentence relates to revocation and is still more limited. It omits any reference not only to any member of the Board or any of its agents or agencies but specifically *empowers the Board* and the Board only to revoke. The fourth sentence relates to the administration of oaths and the conduct of hearings. It is not limited and gives that power to *any member of the Board, any agency, or agency designated by the Board* for such purposes. It must furthermore be noted that Section 11 applies to *all hearings and investigations*. Obviously from reading the text of the Act, and without any recourse to the legislative history, the conclusion is inescapable that Congress intended a different power to be granted to the Board in connection with the issu-

ance of subpoenas than it did in its grant to the Board of the investigatory powers and the administration of oaths; and, just as obviously, it intended to grant a different power to the Board in connection with revocation of subpoenas than either the issuance thereof or the investigatory and oath giving powers. From the face of the Act and from the legislative history it would seem to me that the powers granted in Section 11 concerning the issuance of subpoenas was not delegable and might be exercised by the Board *or any member* thereof, but that the *revocation* of subpoenas could *only* be exercised by the Board acting as *a whole Board* or through one of its panels authorized to be set up in panels of three, as set forth in Section 3 (b) of the Act (29 U.S.C.A. c. 153 (c))." (Emphasis in original text.)

The Court in the *Pesante* case followed this Court's decision in the *Cudahy* case supra and quoted at length from that decision.

The Petitioner cites the case of *National Labor Relations Board v. John S. Barnes Corp.*, 178 F. 2d 156, 17 Labor Cases ¶ 65,464 (1949). In this case the Seventh Circuit Court of Appeals held that the *issuance* of a subpoena in a representation proceeding by a regional director of the Board was valid as against contention such power could not be lawfully delegated. The Court below said of the Barnes decision:

> "The Seventh Circuit's remarks about petitions to revoke in N.L.R.B. v. John S. Barnes Corp., 178 F. 2d 156, 160, were necessarily dicta as it does not appear that any such petition was filed in that case."

To add to that, the Barnes case was concerned solely with the *issuance* of subpoenas which under the Act is a

purely ministerial act not in any respect comparable to *revocation*.

The Petitioner cites *N.L.R.B. v. Lewis Food Co.*, (10-29-57) (CA-9), 41 LRRM 2078, in which the court held that the power to revoke subpoenas may be delegated by the Board to a trial examiner in an unfair labor practice proceeding. We submit again that it is to be noted that this too is an unfair labor practice proceeding before a trial examiner, which proceeding is entirely different in scope from the proceeding in this case, and that the judicial powers and authority of a trial examiner are not comparable to the purely ministerial or administrative investigations conducted by a hearing officer in a representation case. It is further noted that the *Lewis* decision cites with approval and follows *N.L.R.B. v. Gunaca*, 230 F. 2d 542, 37 LRRM 2576, affirming *N.L.R.B. v. Gunaca*, 185 F. Supp. 790, 37 LRRM 2109, and *N.L.R.B. v. International Typographical Union*, 76 F. Supp. 895, 21 LRRM 2483 (1948). Both of these cases were unfair labor practice proceedings before trial examiners. In the *Gunaca* case the question was whether the Board could delegate its power of issuance and revocation of subpoenas. In upholding the power of delegation, however, the Court relied upon Section 7 (b) (Title 5, P. 1006 (b) U.S.C.) of the Administrative Procedure Act. In the *Typographical Union* case, which was quoted with approval and followed in the *Gunaca* case, the Court relied upon the same section of the Administrative Procedure Act stating that the National Labor Relations Act and the Administrative Procedure Act should "be read together". Neither of the decisions in these cases applies to the instant case, nor does their reasoning apply, since the cited section of the Administrative Procedure Act does not apply to representation cases nor to hearing officers in those cases. In the *Lewis* case the Court stated:

"The Pesante and Duval cases are neither contrary nor apposite. Both involved the question of whether a Regional Director was a party to a representation hearing, as distinguished from an unfair labor practice proceding."

In the *Lewis* case the Court also states, referring to the legislative history of the Act:

"The Congressional history, although somewhat favorable to appellees' position, is realistically meager and inconclusive. The Act was discussed prolifically in Congress, but the delegability of powers granted by Section 11 (1) was not."

Then the Court goes on to attempt an interpretation of the Act on the basis of the "practical difficulties in administration which would arise as a consequence of holding that the power to rule on petitions to revoke subpoenas is non-delegable" and that these "difficulties" would substantially impede the effectuation of the Board's primary function. We submit first that this Court should not approve such a "rule of convenience" in interpreting the legal effect of a statute. It would seem that this is engaging in "judicial legislation" and the Ninth Circuit should have made a decision upon the wording of the Act, which is plain enough, and such legislative history as we have, which certainly supports the position that such powers are not delegable.

As to the practical side of administering the Act under the Respondents' theories and the decision of the Court below this Court has stated in a similar reference in the *Cudahy* case:

"Even though Congress has underestimated the burden which it has placed upon the Administrator, which is

by no means clear, we think that the legislative record establishes that Congress has withheld from him authority to delegate the exercise of the subpoena power, and that this precludes our restoring it by construction."

The Petitioner states in its brief (Pet. Brief 38) that it is invoking "the traditional rule, relied upon by this Court in *Mohawk*, that a statute will not be construed to make it administratively unworkable if another construction is reasonably possible."

As the Fifth Circuit pointed out in this case:

"An administrative remedy under which any person served with a subpoena duces tecum may seek protection from the Board itself to make certain that the evidence is described with sufficient particularity and is relevant to the inquiry should not, we believe, prove unduly burdensome to the Board. If it does the remedy lies with Congress, not with the courts. In most cases, methods less burdensome to the respondents than subpoenas duces tecum are availabe to the Board, such as the right of 'the Board,' or its duly authorized agents or agencies' to have access to and to copy any evidence, supplemented if need be by the use of subpoenas ad testificandum, required to be issued upon the application of any party."

Though the Petitioner takes the position that Congress could not have intended that it have these possible additional duties there is nothing in the legislative history of the Act to show that Congress considered the workload of the Petitioner in these respects at all. Apparently Congress enacted the law, with its specific requirements as to revocation of subpoenas, without any consideration of the work of the Board, one way or the other.

For the Petitioner to say that the Respondents' and the Fifth Circuit's interpretations of the Act would make the Act "unworkable" is to presume a state of facts, which are not existent, have not been shown to be even a possibility and certainly is not admitted by Respondents. The Petitioner admits (Pet. Brief 36) that the Board's processes are interrupted for consideration of subpoena matters "in only a handful of cases". Under one of the theories of Petitioner the hearing officer could rule upon the subpoena revocation subject to review by the Board. It is evident that this argument is advanced to permit the Board to continue its present practice of having hearing officers rule upon revocation of subpoenas. However, if this should be approved, the Petitioner is in effect admitting that there has been no final ruling of the Board in this case and therefore the judgment of the Court below as to this point should be affirmed.

Although the Board has given considerable statistical information (Pet. Brief 36), it has not cited to this Court any figures showing the number of subpoena questions which have arisen. Out of the thousands of cases handled by the Board only nine cases are mentioned in the Appendix and nine cited at Note 9 on page 20. The Board obviously keeps records of all subpoenas and their disposition. Note 82, page 16, Administrative Procedure in Government Agencies, Part 5, Sen. Doc. 10, 77th Congress, 1st Session, states that regional directors and trial examiners "are required to keep a record of each subpoena issued, stating the name of the person subpoenaed, the hearing for which he is summoned, and whether the subpoena was actually used". Subpoena questions do not ordinarily arise in Board proceedings and enforcement proceedings are very rare. In the Twentieth Annual Report of the Board for the

fiscal year ended June 30, 1955 (page 155) there were only two cases of subpoena enforcement mentioned and in the next report (June 30, 1956) (pages 159-160) there were mentioned only the Gunaca and the instant cases.

It is true that the Board has a large number of both representation and unfair labor practice cases filed during a year. However, the great majority of them are disposed of without any sort of formal action—much less issuance of subpoenas. For example, for the fiscal year ending June 30, 1956 (the last figures available) there were 8070 representation cases disposed of, and 78.5% of them were closed without any formal decision by the Board. There were 5619 unfair labor practice cases closed and 89.5% of these were disposed of without any formal action by the Board (Twenty-First Annual Report, page 3). The Petitioner states in its Brief (page 36) that there were 855 subpoenas issued, 218 of them *duces tecum*, during a "comparable period", evidently the year ending June 30, 1956. Since under the decision of the Court below, accepted by the Petitioner in this respect, only *duces tecum* subpoenas are subject to petitions to revoke, the Board then could only be concerned with a possible maximum of 218 subpoenas in representation cases at least for that year. Since the Board gave no figures on how many of these subpoenas were contested we can only assume the number was extremely small. This conclusion is supported by the fact that apparently there were only four enforcement proceedings in two years where decisions occurred in those two years. This is also supported by general knowledge of Board practice—that very few subpoena questions arise in representation hearings.

We also can assume that the Board has followed the judgment of the Fifth Circuit in this case. At least the

Board followed it to the extent of itself ruling upon a petition to revoke a subpoena in another representation case (*Cosco Products Company*, Case No. 12-RC-195, N.L.R.B. , Nov. 1, 1957). In this case the employer's petition was mailed to the Board on Saturday, September 14 and the Board's order denying the petition (without any statement as to the grounds or reasoning upon which it was denied was made on Tuesday, September 17. We seriously doubt if the consideration of this petition to revoke, or any other petitions to revoke subpoenas, could or would cause the Board any considerable interference. In the *Guinaca* case the Court stated, as some basis for holding that subpoena power could be delegated in an unfair labor practice case, that

> "It would seem to this Court that one should be very slow to presume that Congress intended to enact a statute which would require a review of testimony possibly two or three thousand miles from the place where the testimony was taken after having it transcribed with all the attendant delays and expense in proceeding before the N.L.R.B. that would be involved."

The above assumption does not exist in actual practice.

As we have seen in the case just above cited, the Board does not do that. In the *Cosco* case cited the Board made a decision upon the basis of the petitions as filed. Why should there be any more concern by the Board with this than there is with the numerous other Board orders?

If the board has complied with the Fifth Circuit's order in this case in the geographical territory covered by that Court, as it appears the Board has done, it has not caused

any great upheaval in the Board's processes so far as is apparent. The Board has not mentioned to this Court anything at all about the actual (not the prophesied) experience the Board has had in this territory for that period of time, to-wit, from April 2, 1957, regarding rulings on petitions to revoke subpoenas.

We conclude that the Board has no real basis for a contention that its processes would grind to a halt or even be seriously interfered with when a petition to revoke subpoenas is presented. It certainly would not require the Board to consider any review of testimony (what would be the necessity for that?), nor require any delay or unusual expense. As demonstrated in the *Cosco* case, *supra*, the Board need merely to handle such a petition in the usual routine manner and rule upon it, basing its ruling upon whatever is stated in the petition and any answer filed.

B. The Board's Jurisdiction as to Revocation of Subpoenas Is Original and Not Appellate

The Petitioner contends that there has been no "true delegation" of the Board's power to rule on petitions to revoke subpoenas because the Board retains "ultimate control". No cases are cited supporting this theory as to the National Labor Relations Board.

We do not believe the Petitioner's position on this is sound. The jurisdiction of the Board under the Act in the matter of revocation of subpoenas is original and not appellate and the Board cannot by its own rule change that. The Board cannot legally permit hearing officers to rule upon petitions to revoke subpoenas in representation cases at all. But Board has attempted (though without power

to do so) to give hearing officers power to rule upon revocation of subpoenas by stating in its rules (Section 102.58 (e): "The regional director or the hearing officer, as the case may be, *shall revoke* the subpoena, if *in his opinion,* the evidence whose production is required does not relate to any matter under investigation. * * * " (emphasis supplied). This wording clearly shows an attempt to bestow upon hearing officers full power to rule upon revocation and full power to exercise his own individual judgment in doing so. The Petitioner is contending that the jurisdiction of the Board is appellate in nature, and this would be the only way such a theory could be supported. The Board in its Rules uses the words "special *appeal*" (emphasis supplied). The court below considered this and specifically stated in its opinion that the Board's jurisdiction is original in this respect and not appellate, in these words:

> "Under the Act, we think that the Board's jurisdiction to pass on petitions to revoke subpoenas duces tecum is original, not appellate, that the denial of the petitions by the hearing officer was a mere nullity, and that the respondents were not required to request special permission of the Board to appeal" (R. 164).

The Petitioner cites Davis, *Administrative Law*, page 74. At that page occurs this statement:

> "If a superior gives a subordinate elaborate and detailed instructions about the exercise of a power and closely supervises its exercise, acting personally in all important or novel cases, the real power is largely exercised by the superior, even though some of the routine problems that fall clearly within the terms of the instructions may never come to the personal attention of the superior."

This statement does not accord with the facts in this case. It is true that the hearing officer is a minor employee

having no real power as to *any important feature of the representation hearing*. As we have shown he cannot rule upon any important issue. But the Board has attempted to give him one of the most important powers exercised by any administrative agency—the power to rule upon subpoenas. And there are no "detailed instructions" about how to make his decisions—in fact no instructions at all except to exercise his "opinion."

Davis also states, page 75:

"The extent of permissible subdelegation depends primarily upon the intent of Congress."

We submit that there is a total absence of any intent on the part of Congress to allow subdelegation of subpoena powers to a hearing officer—in fact, just the opposite. The Act in question specifies *the Board* shall rule upon revocations. It seems apparent that Congress did not intend for hearing officers to rule upon petitions to revoke subpoenas since Congress would have inserted the words "agent" or "employee" as it did in other cases of subdelegation. For instance in the Act there are many instances where Congress specified subdelegation of powers:

Section 3 (b) where the Board is authorized to delegate "its powers" to a group of three members.

Section 3 (d) specifying that the Board may "prescribe" the "duties" of General Counsel.

Section 4 (a) which goes into detail as to the duties and powers of trial examiners.

Section 9 (b) which restricts to the Board, and the Board only, the power to decide bargaining units. It is interesting to note that here is exactly the same language as Congress used in the subpoena section but the Board has never contended that hearing officers, or any one else, except the Board, can determine bargaining units.

Section 9 (c) (1) where Congress expressly permitted the Board to have an "officer or employee of the regional office" to conduct representation case hearings but strictly limited his powers. In this same section the direction of an election is limited to "the Board" and the Board follows this—neither regional directors nor hearing officers can direct elections.

Section 10 (b) where the Board is empowered to designate "any agent or agency" to issue complaints and also permits the Board to have unfair labor practice hearings before the Board or a member of the Board "or before a designated agent or agency".

Section 10 (c) which specifically and carefully outlines how trial examiners are to make rulings and the Act here permits trial examiners to prepare and serve on the parties a "proposed report together with a recommended order, which shall be filed with the Board", and further provides that if there are no exceptions to the proposed order it will become the order of the Board.

Section 10 (e) provides that the "Board" may petition any circuit court of appeals for enforcement of its orders. This has never been construed to mean that the General Counsel or anyone else could so petition. The same power and the same wording is used in Section 10 (j) with the same interpretation.

Section 11 (1) where the Board is given authority of investigations the wording is "The Board, or its duly authorized agents and agencies * * * ." Here also we have the language regarding subpoenas which has been treated fully elsewhere in this brief.

Section 11 (2) where the "Board" only is given authority to apply to District Court for enforcement of subpoenas.

These citations bring almost overwhelmingly a conclusion that Congress specified where delegation could be made and where it could not and what was reserved to the Board for its original decision.

C. The Exhaustion of Administrative Remedies Theory

The petitioner contends that the Respondents fail to exhaust their administrative remedy of what it calls a "special appeal to the Board".

This is a novel and we believe an erroneous application of the theories of exhaustion of administrative remedies. Here the Board is contending in this Court that because the Respondents did not ask the Board if it could appeal that Respondents cannot now defend the Board's attempt to enforce the subpoenas. If there is any fault attaching to the fact that Respondents did not ask the Board's permission to "appeal" it is the Board's fault since the Board itself *refused* to rule on the petitions when they were presented. As we have previously pointed out in this brief the Board had a number of opportunities to consider and rule

upon the petitions. Since the Board itself brought the suits to enforce the subpoenas the Board in effect denied the petitions. Or the Board could have on its own motion ruled upon the petitions if such was deemed advisable. The Board cites such a case in its Brief, page 20, Note 9.

It seems to us that the Board waived any right it may have had to require a party to ask for permission to appeal, if it has any such rights, when the Board, after full knowledge of all the facts, proceeded in District Court for enforcement, without taking advantage of its several opportunities to rule upon them.

But there is no theory of exhaustion of administrative remedies that applies to this situation. As stated in 42 American Jurisprudence 583, ¶ 199:

> "On the other hand, the doctrine does not apply where, by the terms or implications of the statute authorizing an administrative remedy, such remedy is permissive only * * *,

citing in Note 9 the following cases:

> *Colteryan Sanitary Dairy v. Milk Control Commission*, 332 Pa. 15, 1 A. (2d) 775, 122 ALR 1049; *Moore v. Illinois C.R. Co.*, 312 U. S. 630, 85 L. Ed. 1089, 61 S. Ct. 754; *State ex rel. Railroad & W. Commission v. Minneapolis & St. L. R. Co.*, 80 Minn. 191, 83 NW 60, 89 Am. St. Rep. 514; *Smithmeyer v. United States*, 147 US 342, 37 L. Ed. 196, 13 S. Ct. 321.

In any event the doctrine does not apply where the administrative determination is attacked by way of defense

only. *Clinkenbeard v. U. S.*, 21 Wall (U. S.) 65, 22 L. Ed. 477.

A closer look at what is really concerned here convinces us that the doctrine would not apply for other reasons. The Respondents do not have any "remedy" at all. Here we have merely a negative statement in the Board's Rules, not in the law itself, promulgated by the Board, which does not give parties before the Board a "remedy" at all—merely says to the parties before it that they cannot appeal directly to the Board unless the Board approves such an appeal in advance. It is not a *requirement* that this be done—it is merely a hypothetical and uncertain possibility of an appeal.

It seems also from the fact the Board itself promulgated this rule and from its very wording that the Board has no standing in Court to urge that the Respondents are *required* to ask permission to appeal. The Board itself worded the rule and did not make it a *requirement* that parties ask for permission to appeal; the Board itself failed to *require* that parties appeal; the Board itself failed to word the rule so that a party would have a right to *appeal* rather than merely a right to ask *permission* to appeal.

We submit to the Court that we are not concerned with a Court review of an administrative action, we are concerned with a separate statutory proceeding designed and provided to aid the Board. The Board is the party in need of the Court's assistance. It seems to us that the Board, being the party in need of the Court's assistance is derelict in its duty and responsibilities to the Federal Government and the parties if it needlessly goes to Court when such action might not have been necessary and the Board itself

refused to make a decision (or claims it has not) that such application to the Courts is necessary. We submit the Board had at least five separate opportunities to consider and rule upon the petitions to revoke: 1, When petitions to revoke were sent to the Board by Respondents; 2, In communications with its hearing officer; 3, When the hearing was ended on the record as it then stood; 4, When the matter was turned over to the Board and the Board decided instead of ruling upon them to start proceedings for judicial enforcement; 5, at any time or its own motion.

CONCLUSION

For the foregoing reasons the Respondents respectfully urge that the judgment of the Court below be affirmed.

Respectfully submitted.

THEO HAMILTON
ATTORNEY FOR RESPONDENTS

January 1958.

Address of Attorney for Respondents:

HAMILTON & BOWDEN
401 Smith Building
Jacksonville 2, Florida

APPENDIX "A"

NATIONAL LABOR RELATIONS BOARD
Washington 25, D. C. January 11, 1956

Mr. Theo Hamilton
Hamilton & Bowden
Suite 401 Smith Building
Jacksonville 2, Florida

Re: Duval Jewelry Company of Miami, Inc.
Case No. 10-RC-3333

Dear Mr. Hamilton:

Your Petition to Revoke Subpena in the above-mentioned case has been received.

Section 102.58 (c) of the Board's Rules and Regulations require that a petition to revoke subpoena " . . . shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer . . ." Accordingly, the Board will not entertain your petition. I, therefore, am returning your petition herewith, for appropriate filing consistent with the Board's rules.

Very truly yours,

/s/ Ogden W. Fields

OGDEN W. FIELDS
ASSOCIATE EXECUTIVE SECRETARY

CC: Peter L. Hall
Regional Director
Hearing Officer